85-701

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Congress reached a permissible balance under the First Amendment to the Constitution of the United States in 2 U.S.C. § 441b, which requires all corporations and labor organizations to finance all of their expenditures in connection with federal elections from separate segregated funds containing contributions voluntarily designated for political purposes.

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OPINION BELOW

The July 31, 1985 opinion of the court of appeals (App. A, *infra*) is published at 769 F.2d 13 (1st Cir. 1985). The June 29, 1984 decision of the United States District Court for the District of Massachusetts is published at 589 F. Supp. 649 (D. Mass. 1984) (App. B, *infra*).

JURISDICTION

This case arises from a suit filed by the Federal Election Commission pursuant to 2 U.S.C. § 437g

(a)(6) to enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("the Act").[1] The United States Court for the District of Massachusetts had original jurisdiction of the case pursuant to 28 U.S.C. § 1345, and the appellate jurisdiction of the United States Court of Appeals for the First Circuit was based upon 2 U.S.C. § 437g (a)(9) and 28 U.S.C. § 1291. On July 31, 1985 the First Circuit entered its final judgment, holding that respondent's corporate expenditures violated 2 U.S.C. § 441b, but finding that section unconstitutional as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation" (App. 24a). The Commission filed a timely notice of appeal in the United States Court of Appeals for the First Circuit on August 28, 1985 (App. D, *infra*). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 602, 91 Stat. 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), and by the Federal Courts Improvements Act, Pub. L. No. 98-620, 98 Stat. 3357 (1984).

The full text of 2 U.S.C. § 441b is reprinted in App. F, *infra*.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act prohibits "any corporation whatever" or any labor organization from utilizing treasury funds to finance contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b(a). It permits, however, the use of such treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C). In turn, corporations and labor organizations are restricted to soliciting contributions to those separate segregated funds from a restricted class for unions, members and their families, and for corporations, stockholders, executive and administrative personnel, and their families and members of membership corporations. 2 U.S.C. § 441b(b)(4). Since the statutory definition of "political committee" expressly includes separate segregated funds, 2 U.S.C. § 431(4)(B), they are governed by the same reporting and disclosure requirements applicable to other political committees. *See* 2 U.S.C. §§ 433 and 434.

The Massachusetts Citizens for Life, Inc. ("MCFL") is a non-profit, non-stock, non-membership corporation incorporated under the laws of the Commonwealth of Massachusetts (App. 3a). Shortly before the September 19, 1978 Massachusetts primary elections, MCFL published and distributed a

flyer entitled "Special Election Edition." The flyer was headed "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." Every candidate for each office in Massachusetts was identified as either supporting a pro-life position or opposing a pro-life position on three issues which MCFL chose to highlight. The flyer expressly urged readers that "[n]o pro-life candidate can win in November without your vote in September . . . . Thus, your vote in the primary will make the critical difference in electing pro-life candidates." The last page of the flyer contained a form, captioned "VOTE PRO-LIFE," to be filled in with the pro-life candidates in the reader's district, and clipped out to take to the polls.[2]

MCFL had more than 100,000 copies of the Special Election Edition flyers printed for distribution (App. 4a).[3] MCFL expended $9,812.76 to prepare, print and distribute the flyers. MCFL paid the entire $9,812.76 for the election flyer from the corporation's general treasury funds, for it did not establish its separate segregated fund until 1980 (App. 5a).

On May 1, 1979, a complaint was filed with the Commission alleging that MCFL had violated the Act

[2] Ten Copies of the Special Election Edition flyers, designated as Exhibits 1 and 2 of the District Court Complaint, App. E, *infra* have been lodged with the Court.

[3] MCFL distributed a newsletter irregularly several times a year. Each of these regular newsletters included a newsletter masthead and carried a volume and issue number, neither of which appeared on the Special Election Edition. The regular newsletters contained articles of interest to MCFL members, information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information. MCFL had never distributed any of its regular newsletters to more than a few thousand recipients, and the October, 1978 newsletter was distributed to only 3,119 recipients. (App. 3a).

by utilizing corporate funds to distribute the Special Election Edition flyers. On June 27, 1979, the Commission found reason to believe that MCFL had violated 2 U.S.C. § 441b(a) and initiated an investigation. On October 21, 1980, the Commission found probable cause to believe that MCFL had violated 2 U.S.C. § 441b(a) by using corporate funds to prepare, print and distribute its Special Election Edition flyers to members of the general public. After the Commission's attempt to conciliate failed to produce an agreement that would correct or prevent the violation, the Commission authorized the filing of this civil action to enforce section 441b. (App. E, *infra*.)

B. The Decision Of The Court Below

The court of appeals rejected MCFL's arguments that its expenditures were not covered by 2 U.S.C. § 441b, and specifically found that those expenditures violated section 441b as alleged by the Commission[4] (App. 15a). The court held that the Special Election Edition expressly advocated the election or defeat of clearly identified candidates, and that it did not fall within the statutory exemption for the media codified at 2 U.S.C. § 431(9)(B)(i) (App. 16a-19a). After a detailed examination of the legislative history, the court concluded "that section 441b prohibits

[4] The district court had granted MCFL's motion for summary judgment because it had accepted the arguments rejected by the court of appeals and found that MCFL's expenditure of corporate funds did not violate section 441b. The district court also opined that if it had misinterpreted the Act, application of section 441b to MCFL's expenditures "would violate its rights to freedom of speech, press and association . . . ." (App. 38a).

expenditures in connection with federal elections as well as expenditures made to candidates for federal office (App. 6a-15a). Therefore, we hold that the expenditure in the instant case is embraced by the section 441b definition of expenditure." (App. 15a).

Although it thus found that MCFL's expenditure of corporate funds to produce and distribute the Special Election Edition violated section 441b, the court went on to conclude that as applied to expenditures by non-profit "ideological" corporations like MCFL, section 441b was unconstitutional (App. 24a). Although it apparently recognized that section 441b does not restrict corporate expenditures so long as they are financed through a separate segregated fund, the court found that the statute infringed the corporation's First Amendment rights by eliminating what the court viewed as a "simpler method" of financing such expenditures (App. 20a-21a). The court of appeals acknowledged that this Court identified several compelling governmental interests supporting section 441b in *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 207-208 (1982), but concluded that MCFL's expenditures in this case did not pose the risks to the "integrity of the electoral process" which section 441b was enacted to prevent (App. 21a-22a). For these reasons, the court of appeals affirmed the district court's judgment in MCFL's favor, but on alternate constitutional grounds.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING UNCONSTITUTIONAL AN INTEGRAL AND LONG-STANDING PROVISION OF THE FEDERAL ELECTION CAMPAIGN ACT.

The issue presented by this appeal is the constitutionality of the Congressional judgment in enacting 2 U.S.C. § 441b, that all corporate and union political expenditures in connection with federal elections should be financed solely from a separate segregated fund containing contributions voluntarily designated for political purposes.[5] The court of appeals, while acknowledging that the Act did not bar MCFL from making such expenditures through a separate segregated fund, found the provision unconstitutional as applied to "non-profit, ideological corporations" because it eliminates what the court considered the "simplest method" of financing political expenditures (App. 20a-24a).

Three years ago, this Court unanimously rejected a similar argument — that section 441b's prohibition on the expenditure of corporate treasury funds to solicit political contributions from the public at large was unconstitutional as applied to a corporation that is as non-profit and "ideological" as MCFL. *FEC* v. *National Right to Work Committee*, 459 U.S. at 209-210. "That case turned on the special treatment historically accorded corporations," *FEC* v. *National*

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[5] The court of appeals specifically found that MCFL's corporate expenditures violated 2 U.S.C. § 441b, but that the statute as applied to MCFL was unconstitutional. It is well settled that when a federal statute is found unconstitutional as applied, a direct appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a) is in order. *Fleming* v. *Rhodes*, 331 U.S. 100, 104 (1947); *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982); *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981).

Conservative Political Action Committee, 105 S. Ct. 1459, 1468 (1985), a consideration which is equally applicable here.[6] The decision of the court below to single out "non-profit, ideological corporations" for a constitutional exemption from Congress' longstanding regulation of the financing of corporate and union expenditures to influence federal elections cannot be reconciled with this Court's conclusion in *National Right to Work Committee*, 459 U.S. at 206-211, that the First Amendment does not require Congress to treat such corporations differently under section 441b.

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[6] The Eleventh Circuit, sitting *en banc*, unanimously found this Court's reasoning in *FEC* v. *National Right to Work Committee* to compel upholding section 441b's prohibition on the use of corporate and union treasury funds to make expenditures in connection with federal elections. *Athens Lumber Co.* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (answering in the negative questions listed at 689 F.2d 1006, 1015-1016 (1982)), *appeal dismissed, cert. denied*, 104 S. Ct. 1580 (1984). The courts have upheld 2 U.S.C. § 441b and its predecessors against similar First Amendment challenges in a variety of circumstances. *See California Medical Association* v. *FEC*, 453 U.S. 182, 193-201 (1981); *United States* v. *Chestnut*, 394 F. Supp. 581, 588-591 (S.D.N.Y. 1975), *affirmed*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *International Association of Machinists* v. *FEC*, 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), *affirmed mem.*, 459 U.S. 983 (1982); *Bread Political Action Committee* v. *FEC*, 635 F.2d 621, 626-633 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982); *United States* v. *Boyle*, 482 F.2d 755, 763-764 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters*, 434 F.2d 1116, 1122-1123 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, 1128, *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC* v. *National Education Association*, 457 F. Supp. 1102, 1109 (D.D.C. 1978); *FEC* v. *Weinsten*, 462 F. Supp. 243, 246-249 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976).

As we show below, the court of appeals' decision here, if allowed to stand, will substantially alter federal election campaigns by permitting, for the first time in almost forty years, the unlimited use of corporate and union treasury funds for political expenditures with no public disclosure of the actual sources of such financing. Just last Term, this Court noted that it had not yet been presented with a case requiring it to reach "the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *FEC* v. *National Conservative Political Action Committee*, 105 S. Ct. at 1468. The constitutionality of this longstanding federal statute regulating the financing of such expenditures is an unresolved question of significant national importance, which merits plenary consideration by this Court.

A. Section 441b Does Not Restrict Political Speech.

As stated by the sponsor of the 1971 amendments to the predecessor of section 441b, Congress intended that provision to prohibit only "the use of corporate and union *treasury funds* to reach the general public in support of, or opposition to, Federal candidates. . . ." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen) (emphasis added), *quoted in Pipefitters* v. *United States*, 407 U.S. 385, 431 (1972). To make this limited purpose clear, Congress in 1971 enacted an explicit exception from the statute's prohibitory language, now codified at 2 U.S.C. § 441b (b) (2) (C), which allows corporations and unions to use their treasury funds to operate a voluntary separate segregated fund for political purposes. A "separate segregated fund may be completely controlled

by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *FEC v. National Right to Work Committee*, 459 U.S. at 200 n.4. *See also Pipefitters* v. *United States*, 407 U.S. at 414-417; *Buckley* v. *Valeo*, 424 U.S. 1, 28 n.31 (1976). The corporation or union operating the fund can use its own treasury money to pay the fund's administrative costs and to solicit contributions from the corporation's or union's members, stockholders and executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(4).

Thus, the Act is carefully limited to restricting only the corporation's or union's use of its treasury funds to make contributions or expenditures to influence federal elections; it expressly permits the corporation or union, through its separate segregated fund, to contribute up to $5,000 directly to any candidate and to make unlimited independent expenditures communicating to the public the corporation's or union's support for, or opposition to, any candidate. Indeed, section 441b would not prohibit MCFL's distributing the same election flyers to the same people in the same manner it did here, so long as it finances it through a separate account containing contributions voluntarily designated for political purposes.[7]

There is nothing in the record of this case to justify the court of appeals' failure to defer to Congress' considered judgment that the financial regulations contained in 2 U.S.C. § 441b represent a permis-

[7] In fact, MCFL did establish such a separate segregated fund in 1980, and has reported to the Commission having made expenditures from that fund in every federal election cycle since.

sible constitutional balance.[8] More than 2900 separate segregated funds have been established by corporations and unions, which reported to the Commission receiving $185.6 million in voluntary political contributions and expending $169.1 million on contributions and expenditures during the 1983-84 election cycle. *See FEC Reports on Financial Activity 1983-1984*, Vol. I at p. 78 (May 1985). This graphically demonstrates that, in contrast to the statutes this Court found unconstitutional in such cases as

[8] In 1971, when the exception expressly permitting establishment of separate segregated funds was added to section 441b, Congress carefully weighed the constitutional considerations. As summarized by Congressman Hansen, the author of the 1971 amendments:

> [T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject . . . and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language.

117 Cong. Rec. 43,381 (1971), *quoted in Pipefitters* v. *United States*, 407 U.S. at 431. This conscious conclusion by Congress is entitled to substantial deference from the courts. *FEC* v. *National Right to Work Committee*, 459 U.S. at 209, *citing Rostker* v. *Goldberg*, 453 U.S. 57, 64, 67 (1981). *See also, e.g., Walters* v. *National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-3189, 3193 (1985); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 775-795 (1978); *Buckley* v. *Valeo*, 424 U.S. at 39-59; and *FEC* v. *National Conservative Political Action Committee*, 105 S. Ct. at 1465-1471, section 441b has not had the effect of limiting the free flow of political information and opinion from corporations and unions to the public.

The court of appeals did not dispute the Commission's showing that section 441b has not had the effect of limiting corporate or union political speech. Instead, the court found the statute unconstitutional because it eliminated what the court considered "the simplest method" of financing corporate speech (App. 20a). While the Act's administrative requirements for political committees, 2 U.S.C. §§ 432-434, are applicable to separate segregated funds as well, this Court has never suggested that the First Amendment entitles corporations to employ a "simpler method" of financing political expenditures than is available to others who wish to engage in group political expenditures. As we have shown, section 441b leaves the amount and content of a separate segregated fund's expenditures unrestricted, and "it is well settled that '[t]he [First] Amendment does not forbid . . . regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.'" *Lowe* v. *SEC*, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring), *quoting Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 193 (1946). *Cf. Regan* v. *Taxation With Representation*, 461 U.S. 540, 545, 549 (1983) (upholding Congress' requirement that corporations exempt from federal taxation under 26 U.S.C. § 501 (c)(3) must finance their lobbying efforts through a separate, affiliated corporate entity). Indeed, this

Court has upheld virtually all of the Act's requirements with respect to federal campaign financing without ever finding it necessary to determine whether there was a "simpler method" available.[9] The court of appeals cited no case in which this Court has ever found a statute which did *not* limit speech to violate the First Amendment merely because it makes the task of financing less "simple".[10]

The court of appeals' assertion (App. 21a, n.7) that the First Amendment requires a general exemption from section 441b for corporations like MCFL because of the statute's requirement of disclosure of certain contributors to all political commit-

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[9] *See, e.g., FEC* v. *National Right to Work Committee*, 459 U.S. at 207-211 (limitation on use of corporate funds to solicit contributions to finance political activities); *Buckley* v. *Valeo*, 424 U.S. at 23-38 (prohibition of contributions to publicly financed candidates); *id.* at 60-82 (upholding reporting and recordkeeping requirements for political committees and individuals); *California Medical Association* v. *FEC*, 453 U.S. at 197 (limitation upon contributions to political committees). The Court has similarly upheld against First Amendment challenges a variety of statutes regulating the financial and business operation of newspapers, where the statutes were nondiscriminatory and did not restrict the newspapers' expression. *See* cases discussed in *Branzburg* v. *Hayes*, 408 U.S. 665, 682-683 (1972).

[10] *Linmark Associates* v. *Willingboro*, 431 U.S. 85, 93-94 (1977) and *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974), relied upon by the court of appeals (App. 20a-21a), are not on point. In those coses the Court concluded that the availability of alternative means of communication did not save statutes that prohibited a particular method of speech. Section 441b does not affect the method of communication employed by corporations and unions; so long as it is financed out of a separate segregated fund, a corporation or union can utilize any method of communication it desires.

tees, including separate segregated funds, was effectively rejected by this Court long ago. In *Buckley* v. *Valeo*, 424 U.S. at 68, this Court upheld the reporting requirement against First Amendment attack as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." The Court then rejected the argument that the First Amendment entitles fringe groups to a blanket exemption from the reporting requirement, and ruled that exemption from the Act's reporting requirements is constitutionally mandated only if a group presents specific evidence that it is likely that its contributors will be subjected to harassment if their names were disclosed. *Buckley* v. *Valeo*, 424 U.S. at 72-74. *See also Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91-98 (1982). The court of appeals did not even attempt to explain why these principles would not be as applicable to MCFL as to any other group. *See also Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2282 n.14 (1985).[11]

In sum, there has been no showing in this case that section 441b has interfered at all with the freedom

[11] The court of appeals' further observation that some corporations might not find the separate segregated fund option palatable because they have chosen to be nonpartisan is not relevant to this case. As the court of appeals concluded (App. 16a), the expenditure in this case was for a flyer that expressly advocated the election or defeat of specified federal candidates. If a case ever arises in which a non-profit corporation is charged with violating section 441b by making an expenditure to publish a nonpartisan statement, the applicability of section 441b in such circumstances can be resolved at that time; it is not presented by this case. *See California Medical Association* v. *FEC*, 453 U.S. at 197 n.17.

of corporations and unions to expend as much as they want, through their separate segregated funds, to publicize their views on federal candidates. In the absence of such a showing, the court of appeals' decision to strike down section 441b as applied on First Amendment grounds cannot stand.

B. Section 441b Serves Compelling Governmental Purposes.

Even if the court of appeals were correct in concluding that section 441b indirectly burdens corporate and union political speech to some extent by making fundraising less "simple", the statute should nevertheless be upheld.

> [I]t is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC* v. [*National Ass'n of*] *Letter Carriers*, 413 U.S. 548, 567 (1973). Even a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

Buckley v. *Valeo*, 424 U.S. at 25, *quoting Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975). *Accord FEC* v. *National Right to Work Committee*, 459 U.S. at 207.

Section 441b serves several purposes which this Court has already found to be compelling. First, it is intended to ensure that the wealth which corporations and unions are able to accumulate with the aid of special legal protections intended to serve other purposes cannot be diverted to the electoral process to incur political debts from candidates for federal elective office. *See FEC* v. *National Right to Work Committee*, 459 U.S. at 207; *United States* v. *UAW*,

352 U.S. 567, 579 (1957). Corporations are artificial entities whose accumulation of capital is enhanced by such special advantages as limited liability, perpetual life, and special tax treatment. As such, corporations "are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Such "[f]avors from government often carry with them an enhanced measure of regulation." *Id. See also FEC* v. *National Conservative Political Action Committee*, 105 S. Ct. at 1469.

As this Court has previously explained,[12] Congress acted to prevent the diversion of the assets of corporations and unions to the political sphere only after it became aware of widespread abuses which were thought to present imminent danger of corruption of the federal election process, resulting in a decline of public confidence in the integrity of elected officials and the fair operation of government. This Court has repeatedly recognized the elimination of such circumstances to be a governmental interest of the highest order,[13] so that the "careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to

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[12] *FEC* v. *National Right to Work Committee*, 459 U.S. at 207; *United States* v. *UAW*, 352 U.S. at 570-584.

[13] *See, e.g., First National Bank of Boston* v. *Bellotti*, 435 U.S. at 788 n.26; *Buckley* v. *Valeo*, 424 U.S. at 27; *United States* v. *UAW*, 352 U.S. at 570, 571, 575.

the electoral process." *FEC* v. *National Right to Work Committee*, 459 U.S. at 209.

The court below found this purpose to be inapplicable here because "MCFL's expenditures did not incur any political debts from legislators" (App. 22a). However, the same could be said about the independent expenditures for solicitations made by the National Right to Work Committee; in fact, the court of appeals in that case concluded that such independent "solicitation, without more, will neither corrupt officials nor distort elections." *National Right to Work Committee* v. *FEC*, 665 F.2d 371, 375 (D.C. Cir. 1981), *rev'd*, 459 U.S. 197 (1982). In reversing that decision, this Court emphasized that the constitutionality of section 441b was not to be judged by evaluating the effects on the electoral process of the particular expenditure at issue. Rather, this Court found section 441b to be a valid "prophylactic measure[]" aimed at "the special characteristics of the corporate structure", and concluded:

> While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation.

FEC v. *National Right to Work Committee*, 459 U.S. at 210. As was true of the National Right to Work Committee, MCFL's corporate structure carries the potential for influence which is the proper object of Congressional regulation; whether or not debts were actually incurred in this case does not alter the constitutional analysis.

The second purpose behind section 441b "is to protect the individuals who have paid money into a cor-

poration or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States* v. *CIO*, 335 U.S. 106, 113 (1948)." *FEC* v. *National Right to Work Committee*, 459 U.S. at 208. This emphasis upon ensuring that individuals have the opportunity to make an informed and voluntary choice as to whether their money can be used by others to support political candidates (*see, e.g.*, 2 U.S.C. § 441b(b)(3)(C)), safeguards the individual's First Amendment interest in not being required to contribute to the support of any political candidates against his or her will.[14] It also furthers the important governmental interest in "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government," by guaranteeing each individual the opportunity to make a personal decision about the political options he or she will support. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 788-789, *quoting United States* v. *UAW*, 352 U.S. at 575.

The court of appeals' conclusion that contributors to an ideological corporation like MCFL do not need this protection was candidly based upon a presumption, without any supporting evidence, that anyone who supported MCFL's anti-abortion position would necessarily be willing to contribute to its efforts to elect candidates (App. 22a-23a). However, there is no reason to assume that individuals who oppose abortion necessarily use this as the sole criterion for choosing candidates, or that they are any less interested than

[14] *See generally International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225 (1956).

other Americans in being able to decide for themselves whether their money will be used to assist candidates for federal office, and if so, which candidates it will be used to support. Instead of merely trusting MCFL to make their political decisions for them, such individuals might prefer to make such choices in other ways; for example, they might choose to follow party loyalty in electoral politics, or they might favor a candidate that does not oppose abortion because of that candidate's positions on a variety of other issues they consider important.

Even if the court's presumption were correct, however, it would not justify rejecting the Congressional judgment. If all of MCFL's contributors were willing to support its political expenditures, as the court believes, MCFL would have no more trouble obtaining contributions to its separate segregated fund than to its corporate treasury. If, on the other hand, even a handful of the individuals who contribute to MCFL's campaign to outlaw abortion would prefer to reserve to themselves the choice of when and how their money will be used to support candidates, the statute will have served an important purpose. In either event, it is up to Congress, not the court of appeals, to determine the desirability of ensuring an opportunity for corporate contributors to make an informed choice in this important area. *See Walters* v. *National Association of Radiation Survivors*, 105 S. Ct. at 3190.[15]

[15] The legislative history shows that Congress considered this purpose to apply fully to non-profit corporations whose money comes from ideological adherents. In fact, Senator Taft, whose views on the reach of this statute this Court found to be "controlling" in *Pipefitters* v. *United States*, 407 U.S. at 409, stated that under the statute, even corporations organized for religious purposes "cannot take the church members' money and use it for the purpose of trying to elect a candidate

Finally, a third compelling interest undermined by the court of appeals' decision is the public disclosure of the sources of federal campaign financing. The Act as a whole reflects "Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Buckley* v. *Valeo*, 424 U.S. at 76. Section 441b serves this purpose by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund which, as a political committee, is required to report both its expenditures and its sources of funding for disclosure on the public record. 2 U.S.C. § 434. This Court has found Congress' interest in public disclosure of the sources of campaign spending to be compelling even when applied to those making independent expenditures rather than contributions, since "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley* v. *Valeo*, 424 U.S. at 81.

If the court of appeals' decision is permitted to stand, the voting public will be denied the identities of the individuals who finance the political expenditures of corporations like MCFL, information which Congress has reasonably determined to be important to maintenance of an informed electorate. In fact, as discussed *supra*, pp. 13-14, the court of appeals indicated that eliminating this disclosure requirement was one of the objectives of its decision.

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or defeat a candidate, and they should not do so." 93 Cong. Rec. 6437 (1947).

Moreover, it is not only the identity of individual contributors that will be withheld from the public. Although it appears that MCFL presently may have a voluntary policy against accepting money from corporations, there is no legal bar to other non-profit, apparently "ideological" corporations covered by the lower court's decision accepting funding from commercial corporations having a financial interest in the causes they advocate.[16] The court of appeals' decision would, for the first time, permit such corporations to convert unlimited amounts of money from corporations with substantial commercial interests into campaign expenditures, without ever disclosing to the public the true source of financing. Thus, despite the court of appeals' assumption that its decision only invalidates section 441b's requirements with respect to non-profit, "ideological" corporations, this decision's actual effect is to open an avenue that could be utilized by *any* corporation or union to transfer unlimited amounts of their treasury funds into political expenditures, while keeping the actual source of the financing secret.

In sum, political expenditures by corporations are not restricted by section 441b; only the manner of financing such expenditures is affected, and corporations and unions have been demonstrably successful in

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[16] For example, an organization engaged in apparently "ideological" opposition to nuclear power might receive funding from a corporation engaged in coal mining that is interested in reducing its competition, or an organization engaged in apparently "ideological" advocacy of increased defense spending could be funded primarily by defense contractors. *Cf. Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 298 (1981), ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.")

utilizing the financing methods specified by the statute. Compelling governmental interests support the statute's requirements and it is narrowly drawn to serve those interests without unnecessarily infringing upon corporate and union political activity. In these circumstances, the court of appeals' decision to strike down section 441b as applied is an unwarranted infringement upon Congress' authority to legislate to protect the integrity of the federal electoral process.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant Federal Election Commission respectfully requests that this Court note probable jurisdiction in this appeal, and set this case for briefing and argument on the merits.

Respectfully submitted,

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OCTOBER 25, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr., *U.S. District Judge*]

Before
Breyer, *Circuit Judge*,
Rosenn,* *Senior Circuit Judge*,
and Torruella, *Circuit Judge*.

July 31, 1985

Richard B. Bader, Assistant General Counsel, with whom *Charles N. Steele*, General Counsel, *Lisa E. Klein* and *Carol A. Laham* were on brief for appellant.

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* Of the Third Circuit, sitting by designation.

Francis H. Fox with whom *E. Susan Garsh, Alexandra Leake, Robin A. Driskel* and *Bingham, Dana & Gould* were on brief for appellee.

James O'Connell, Sally O'Connell & Fitch, Jack C. Landau, Jane E. Kirtley, Harry L. Baumann, Steven A. Bookshester, J. Laurent Scharff, Pierson, Ball & Dowd, Richard N. Winfield and *Rogers & Wells*, were on brief for The Reporters Committee for Freedom of the Press, National Association of Broadcasters, Radio-Television News Directors Association and Associated Press Managing Editors, Amici Curie.

James J. Featherstone and *Santarelli and Bond* on brief for National Rifle Association of America, Amicus Curiae.

Majorie Heins and *Elaine Millar* on brief for the Civil Liberties Union of Massachusetts, Amicus Curiae.

Joseph D. Alviani and *Marcia Drake Seeler*, New England Legal Foundation on brief for Home Builders Association of Massachusetts, Amicus Curiae.

ROSENN, *Circuit Judge*. In an effort to curb misuse of corporate funds and preserve integrity in the federal election process, Congress enacted a series of laws prohibiting corporate expenditures and contributions to political campaigns. This appeal presents the question of whether the current statute, codified at 2 U.S.C. § 441b (1982), prohibits the publication by a non-profit ideological organization of a Special Election Edition containing the voting records of federal candidates on a particular issue of interest to the organization's members and whether such a prohibition may be constitutionally applied in the instant case. The United States District Court for the District of Massachusetts held that the publication was not covered by the statute, and that, in

the alternative, prohibition of the publication would violate the organization's first amendment rights. The plaintiff Federal Election Commission (FEC) appealed. We affirm.

I.

The defendant Massachusetts Citizens for Life, Inc. (MCFL) is a Massachusetts non-profit, non-membership corporation, organized "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through education, political and other forms of activities."

Despite its legal status as a non-membership corporation, the organization claimed three classes of "members" in 1978: "dues paying members" who contributed $15.00 per year to the organization; "contributing members" who contributed money to the organization in amounts less than $15.00 per year; and "non-contributing members" who neither paid dues nor contributed money but who had indicated somehow their support for the organization's goals.

For several years, MCFL published a newsletter at somewhat irregular intervals.[1] "Dues-paying and contributing members" automatically received the MCFL newsletter by mail, as did "non-contributing members" when funds were available. The May 1978 newsletter was mailed to 2,109 people; the mailing list for the October 1978 newsletter contained 3,119 names. The MCFL newsletter typically contained information about MCFL activities, solicitations for volunteers and contributions, material on political, administrative, judicial, and legislative developments,

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[1] The newsletter was published three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978.

and appeals to members to contact legislators and express their support of the anti-abortion position.

In periods prior to elections, MCFL published "Special Election Editions." In September 1978 it printed 100,000 copies of a publication captioned "Special Election Edition" with headlines reading EVERYTHING YOU NEED TO VOTE PRO-LIFE. The publication contained no masthead identifying it as a special edition of the MCFL newsletter. The MCFL logo did appear at the top of the publication, and the words "Volume 5, No. 3, 1978" appear to have been handwritten in below the logo by someone on the copy supplied to the court by the FEC.

The publication contained the voting records on abortion-related issues of many candidates for federal and state offices. It included at least two exhortations to "vote pro-life" and the statement that "No pro-life candidate can win in November without your vote in September." The publication contained photographs only of those candidates who were considered "pro-life." At the back of the publication, beside the exhortation "Vote Pro-Life," MCFL printed a disclaimer stating "This special election edition does not represent an endorsement of any particular candidate."

Shortly thereafter, MCFL printed and distributed 20,000 copies of a Complimentary Partial Special Election Edition, apparently for the purpose of correcting minor errors in the earlier edition. This edition did not contain a volume and number designation below the MCFL logo.

Copies of the two Special Election Editions were distributed to 5,985 MCFL contributors and 50,674 non-contributors. MCFL also sent copies to local chapters, presumably for distribution to their members, and mailed copies to individuals who requested

them. The FEC contends that the rest of the copies were left in public areas for general distribution.[2]

MCFL spent a total of $9,812.76 from its general treasury on the two publications. The FEC found probable cause to believe that MCFL violated 2 U.S.C. § 441b(a) by printing the flyers and distributing them to the general public. When conciliation proved unsuccessful, the FEC filed a complaint pursuant to 2 U.S.C. § 437(g)(a)(6)(A) (1982), seeking a civil penalty and such other relief as the court deemed appropriate.

The parties filed cross-motions for summary judgment, and the court granted summary judgment for MCFL, holding that the two publications did not fit within the meaning of "expenditure" as the term is used in 2 U.S.C. § 441b(b)(2) (1982). It also held that the publications were exempted from the prohibition against expenditures by 2 U.S.C. § 431(9)(B)(i) (1982), which exempts "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

The court also concluded that if section 441b were applied to prohibit MCFL's expenditures in connection with the publication in question, the statute

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[2] The FEC submitted an affidavit from Jean Weinberg, not a member of MCFL, who certified that she obtained a copy of the Special Election Edition at a statewide conference of the National Organization of Women. Weinberg averred that she obtained her copy from a stack of about 200 which were available to the general public. MCFL states that it made no copies of the Special Election Edition available to the general public.

would be unconstitutional, violating the organization's rights of freedom of speech, press, and association.

II.

Section 441b(a) provides in part:

> § 441b. Contributions or expenditures by national banks, corporations, or labor organizations.
>
> (a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a *contribution or expenditure* in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office . . . .

(Emphasis added.) Section 441b(b)(2) provides that the term "contribution or expenditure" shall *include*

> any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) *to any candidate*, campaign committee, or political party or organization, in connection with any election . . . .

2 U.S.C. § 441b(b)(2) (emphasis added). This section refers to election expenditures by corporations, which the Act prohibits, except if such expenditures are made from separate segregated funds.

The general definitions section of the Federal Election Campaign Act contains a broader definition of expenditure which "includes"

> any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person *for the purpose of influencing* any election for Federal office . . . .

2 U.S.C. § 431(9)(A)(1) (1982) (emphasis added). This section would seem to apply to the entire Act, including the provisions relating to disclosure by political and campaign committees and to limitations on individual expenditures.

Before the district court and on appeal, the FEC contended that the broader definition set forth in section 431(9)(A)(1) should control in the instant case. Even if the section 441b definition only were to be applied, the FEC argues, the use of the word "include" indicates congressional intent that other activities besides payments to a candidate may be considered contributions or expenditures. The district court, however, concluded that the section 441b(b)(2) definition was intended to be exclusive, because in the court's view, the following provision amounted to an adoption in the general definition section solely of the section 441b(b)(2) definition:

> (B) The term "expenditure" does not include—
>
> (v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization.

2 U.S.C. § 431(9)(B)(v).

On appeal, the FEC contends that section 431 does not adopt the narrower section 441 definition and that

the broader section 431 definition should apply to corporate expenditures.

The presence of the word "include" in section 441b leaves open the possibility that "contribution or expenditure" could encompass more than payments *to* a candidate, campaign committee, or business organization.

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated . . . .
>
> 2A N. Singer, *Sutherland Statutes and Statutory Construction* 133 (4th ed. 1984), (quoting *Argosy Ltd. v. Hennigan*, 404 F.2d 14. 20 (5th Cir. 1968)). *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941), *United States v. Mass. Bay Transportation Authority*, 614 F.2d 27, 28 (1st Cir. 1980) ("Includes is not a finite word of limitation . . . .").

The presence of section 431(9)(B)(v) alone does not indicate that section 441b(b)(2) should be read as though it contained the word "means" instead of "includes." Section 431(9)(B)(v) provides only that the definition of "expenditure" with regard to individual contributions shall be no broader than the definition with regard to corporate contributions. Therefore, the plain language of the statute suggests that "expenditure" in both contexts includes *but is not limited to* contributions *to* candidates, campaign committees, or political organizations.[3]

Ordinarily, the starting point in every case involving statutory construction is the statute itself, *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), but where the statute is ambiguous, legislative history should be consulted. *See United States v. Donruss Co.*, 393 U.S. 297, 303 (1969). Because the two statutory definitions of "expenditure" create some ambiguity, we turn to the legislative history for aid in determining the full scope of the definition of expenditure under section 441b.

2 U.S.C. § 441b originated in the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 865 (1907), which prohibited all corporations from making money contributions "in connection with" elections. The statute was codified at 18 U.S.C. § 610 by the Federal Corrupt Practices Act, Pub. L. No. 68-506, § 302, 43 Stat. 1070, 1071 (1925) (prohibiting corporate expenditures and contributions of "anything of value" to federal candidates) and extended to unions by the War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167 (1943). The statute as amended by the Taft-Hartley Act, Pub. L. No. 80-101 § 304, 61 Stat. 136, 159 (1947), prohibited any corporation or labor organization from making "a contribu-

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[3] In *Reader's Digest Ass'n v. Federal Election Commission*, 509 F. Supp. 1210, 1213, n.2 (S.D.N.Y. 1981), which involved distribution of video tapes by the Reader's Digest to other media outlets, the court noted that Reader's Digest maintained that "the expenditures in question are not prohibited by the statute, since they were not made to any 'candidate, campaign or political party or organization.'" The court added, "However, the statute also covers indirect payments." *Id.*

tion or expenditure *in connection with any election . . .*" for federal office. *Id., quoted in United States v. UAW*, 352 U.S. 567, 568-69 (1957) (emphasis added).

The legislative history of the Taft-Hartley Act includes the 1946 report of the House Special Committee to Investigate Campaign Expenditures which stated:

> The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term "making any contribution" related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?

H.R. Rep. No. 2739, 79th Cong., 2d Sess. 36-37 (1947), *quoted in United States v. UAW*, 352 U.S. at 581. The committee recommended that the statute

> be clarified so as to specifically provide that expenditures of money for salaries to organizers, purchase of radio time, and other expenditures by the prohibited organizations in connection with elections, constitute violations of the provisions of said section, whether or not said expenditures are with or without the knowledge or consent of the candidates.

Id. at 46 (italics omitted), *quoted in United States v. UAW*, 352 U.S. at 582.

During congressional debate on the bill that was ultimately enacted, Senator Taft observed that the term "expenditure" would include any advertisement or newspaper published for political purposes by a union or corporation.

> [W]e have long prohibited corporations from contributing money for political purposes, and it was always supposed that the law prevented a corporation from operating newspapers for that purpose or advertising in newspapers for that purpose, until labor organizations were included . . . and then it was said that the law prohibited contributions, but that political advertisements and political pamphlets could be published by the union or corporation itself.
>
> So what we are proposing to do is to subject labor organizations to exactly the same prohibition to which corporations have been subjected, and, so far as I know, including the things which I think the original law covered but regarding which doubt was raised by labor organizations.

93 Cong. Rec. 6436 (1947).

The following exchange clarifies Senator Taft's position:

> Mr. Pepper. . . . Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the presidency next year, and in opposition to the Senator from Ohio, if he should be the Republican nominee for the

> Presidency, stating that President Truman was a friend of labor and that Senator of Ohio was not friendly to labor? Would that be called a political expenditure on the part of the labor organization?
>
> Mr. Taft. If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another . . . . The prohibition is against a labor organization using its funds either as a contribution to a political campaign or as a direct expenditure of funds on its own behalf.

93 Cong. Rec. 6436-37 (1947).

The foregoing language of Senator Taft indicates his intent that a special election edition of a union or corporate newsletter constitutes a prohibited expenditure under the Act. The Supreme Court provided a gloss to the congressional debate with its comment in *United States v. CIO*, 335 U.S. 106, 121 (1948), noting:

> If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

(Footnote omitted.) The Court held that the statute did not prohibit the publication of an edition of the

weekly *CIO News* which was published with union funds, distributed only to union members or purchasers of the issue, and carried a statement by the CIO president urging all members to vote for a certain congressional candidate.

The Court concluded that "[a]pparently 'expenditure' was added to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section," *CIO*, 335 U.S. at 122 (footnote omitted), and stated that "[i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ, or a newspaper, published by a corporation, from expressing views on candidates . . . in the regular course of its publication." *Id.* at 123.

In *United States v. UAW*, 352 U.S. 567 (1957), the Supreme Court held that expenditure of union dues to sponsor political advertisements on commercial television violated the prohibition against corporate or labor organization expenditures in connection with an election for federal office. The Court examined extensively the legislative history of the Taft-Hartley Act, and concluded that Congress added the term "expenditure" to the statute precisely to embrace indirect campaign contributions such as union-sponsored political advertisements. *UAW*, 352 U.S. at 585. The Court distinguished *CIO* on the ground that the CIO newspaper was distributed only to union members and newspaper purchasers, not to the general public. *United States v. UAW*, 352 U.S. at 589. The evil at which Congress aimed, the Court observed, "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *Id.*

In 1971, the Federal Election Campaign Act added the following language to the statute:

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) *to any candidate*, campaign committee or political party or organization, in connection with any election to any of the offices referred to in this section . . . .

Pub. L. No. 92-225 § 205, 86 Stat. 3, 10 (emphasis added) and provided for the establishment of separate segregated funds to be used for political purposes. *Id.* Representative Hansen, who sponsored the bill, explained that

> The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election.

He added that

> The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18, United States Code, and to codify the case law.

117 Cong. Rec. H43379 (1971). Nothing in Representative Hansen's remarks indicates that the change in language from "in connection with any federal election" to "to any candidate . . . in connection with

any election" was meant to narrow the scope of section 610. *See Pipefitters Local Union 562 v. United States*, 407 U.S. 385, 410-411 (1972).[4] In short, nothing in the legislative history suggests that Congress meant to narrow the prohibition of expenditures "in connection with" a federal election by the 1971 addition of the phrase "to any candidate." We conclude that section 441b prohibits expenditures in connection with federal elections as well as expenditures made to candidates for federal office. Therefore, we hold that the expenditure in the instant case is embraced by the section 441b definition of expenditure.

III.

The district court opinion suggests that even if section 441b on its face were interpreted to preclude the expenditure in the instant case, the section 441b definition of expenditure should be read to incorporate the "express advocacy" requirement set forth in *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). The court concluded that the MCFL publications did not expressly advocate the election or defeat of any particular candidate, and therefore would not come within the scope of section 441b. We do not decide

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[4] The statute was amended again in 1976, in response to *Buckley v. Valeo*, 424 U.S. 1 (1972). In *Buckley*, the Court construed the term "expenditure" as used in the individual expenditure limitation sections to mean express advocacy of the election or defeat of a particular candidate. 424 U.S. at 44. This narrowing gloss was incorporated into the individual expenditure section of the statute in 1976 when the section prohibiting corporate and union expenditures was transferred from 18 U.S.C. § 610 to 2 U.S.C. § 441 by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-293, § 102, 90 Stat. 475, 478.

whether the section 441b definition of expenditure includes an "express advocacy" requirement, because we conclude, contrary to the district court, that the MCFL publication would fit within the definition of expenditure, even if an express advocacy requirement were incorporated into the definition.

The *Buckley* Court stated that "explicit words of advocacy of election or defeat of a candidate include 'vote for,' 'elect,' 'support,' 'Smith for Congress,' 'defeat,' 'reject,' etc." *Buckley*, 424 U.S. at 44, n.52. The statement "Vote Pro-Life" does not fit within the *Buckley* definition of express advocacy because it does not advocate the election of particular candidates for particular offices, but urges support of a general position on a controversial issue. Compare the instant case with *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980). The MCFL Special Election Edition, however, explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only. It reminded the reader that "your vote in the primary will make the critical difference in electing pro-life candidates." [5] Thus, the Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley*. *Id.*

IV.

The district court concluded that, even if the Special Edition amounted to express advocacy, it was exempt from § 441b because it constituted a periodi-

[5] The disclaimer stating that "this special election edition does not represent an endorsement of any particular candidate" does not negate the expressions of advocacy in the publication.

cal publication. 2 U.S.C. § 431(9)(B)(i) (1982) exempts from the reach of the statute "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

The district court stated that the Special Election Editions were similar in newsprint, sheet form size and format to the MCFL Newsletter, which "typically filled 6-10 pages of newsprint and included explanations and endorsements of its opposition to abortion, reports of political developments and judicial rulings on abortion-related issues, announcements of social activities for members, and appeals for funds."

The court observed that the sparse legislative history of the exemption indicates that Congress intended the exemption to be interpreted broadly, coextensive with the First Amendment. Finally, the court noted that, according to the legislative history, the exemption was intended to codify existing law, presumably including dicta from *United States v. CIO*, 335 U.S. 106, 123 (1948), to the effect that "it would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ, or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication."

We believe the Special Election Editions themselves do not constitute newspapers, magazines or periodical publications within the meaning of the statute. MCFL published these editions not periodically, but sporadically, and only during federal election campaigns. Moreover, at least 50,000 copies of

the special editions were distributed at no cost to a large number of people; and the editions contained no printed volume or issue number nor any masthead designating them as newspapers or periodicals.[6]

Defendant argues, however, that the regular MCFL newsletter is a newspaper, magazine, or periodical publication, and that the Special Election Editions may be considered news stories, commentaries or editorials distributed through the newsletter's facilities. However, even assuming that the regular MCFL newsletters may be considered periodical publications, this argument must fail. The circulation of the Special Election Editions constituted approximately *twenty times* that of any edition of the regular newsletter. The Special Editions did not carry the masthead of the MCFL Newsletter; nor did they contain a printed volume and issue number. Although they bore some physical resemblance to the regular newsletters, nothing in the editions informed the reader that the editions were at all related to the MCFL newsletter. In fact, the editions were published by a staff that produced no previous or subsequent newsletters. Under the circumstances, the Special Editions may not be considered news stories, commentaries, or editorials because the editions were not distributed through the newsletter's facilities, were not published by the newsletter staff, did not contain the

[6] It is undisputed that MCFL printed 100,000 copies of the 1978 Special Election Edition and 20,000 copies of the Complimentary Partial Election Edition. In its answers to interrogatories, MCFL stated it had 5,633 "contributing and dues-paying members" in 1976, 5,148 in 1977, and 5,985 in 1978. During this period it published a total of seventeen newsletters. Apparently, only the election editions, published in 1976 and 1978, were distributed to persons who did not contribute financially to the organization.

newsletter masthead, and were not limited to the usual MCFL newsletter circulation.

Neither may the publication of the Special Editions be considered one of the "normal functions of a press entity." *Federal Election Comm'n v. Phillips Publishing Co.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981). In *Phillips Publishing*, the court held that printing and distributing a letter soliciting subscriptions was a normal, legitimate press function and therefore was covered by the press exemption. Similarly, in *Reader's Digest Association v. Federal Election Comm'n*, 509 F. Supp. 1210 (S.D.N.Y. 1981), the court concluded that dissemination of a tape for the purposes of publicizing the magazine would fall within the press entity's legitimate function, and would be covered by the exemption. It is arguable that under certain circumstances publication of a special edition may be described as a normal function of a press entity. However, we do not consider distribution of a special edition at no cost to twenty times the customary circulation of the newspaper to be one of a newspaper's normal, legitimate functions—especially when the special edition does not carry the newspaper's masthead. We therefore hold that the Special Election Editions are not exempted from the reach of section 441b by the press exemption set forth in section 431(9)(B)(i).

V.

Because we conclude that the Special Election Edition falls within the ambit of section 441b, we turn to the question whether section 441b as applied to the Special Election Edition passes constitutional muster. The district court concluded that "if § 441b were intended by Congress to prohibit MCFL's ex-

penditures of printing and distributing the newsletters in question, it would be . . . violative of MCFL's freedoms of speech, press, and association."

The FEC argues that section 441b as applied to the Special Election Edition did not affect MCFL's First Amendment rights, and that the government has a substantial interest in enforcing the statute.

The starting point of our analysis must be a classification of section 441b as a content-based restriction or a regulation of the time, place, or manner of expression. In the instant case, the statute prohibits the use of corporate funds to publish newsletters "in connection with" federal elections. The FEC has no quarrel with the time, place, or manner of expression of the MCFL Special Editions; it is the political *content* of the publications which runs afoul of the statute. Therefore, section 441b must be considered a content-based restriction of expression, and may be justified only by a showing of substantial government interest. *See Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The FEC argues that section 441b does not affect MCFL's First Amendment rights because the Act does not absolutely prohibit corporations from engaging in political advocacy. Under the statute, MCFL would be permitted to use its corporate funds to establish a voluntary, segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C) (1982). Had the Special Election Edition been produced with money from such a fund, the FEC argues, MCFL's freedom to engage in political advocacy would have been preserved. It does not appear to this court, however, that the availability of alternative methods of funding speech justifies eliminating the simplest method. *Cf. Linmark Associates v. Willingboro*, 431 U.S. 85, 93-94 (1977); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974).[7]

The FEC contends that the regulation in the instant case is permissible because it is necessary to protect substantial government interests. The purposes of section 441b were set forth in *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197, 207-08 (1982):

> to ensure that substantial aggregations of wealth amassed by the substantial advantages which go with the corporate form of organization should be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions . . . . The second purpose . . . is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support

[7] Moreover, establishment of a voluntary segregated fund (political committee) requires disclosure of the names of contributors. 2 U.S.C. § 432 (1982). Under certain circumstances, this requirement may deter political activity on the part of individuals and may chill political speech on the part of the corporation. *See* Buckley v. Valeo, 424 U.S. at 74; Federal Election Comm'n v. Hall-Tyner Election Campaign Committee, 678 F.2d 416, 423 (2d Cir. 1982) (campaign disclosure provisions endanger First Amendment rights if an organization demonstrates a pattern of threats or the existence of specific manifestations of public hostility against the organization or its members). In addition, amicus curiae the Civil Liberties Union of Massachusetts (CLUM) contends that many issue-centered organizations would be prohibited by their own by-laws from registering as political committees because of a commitment to the principle of non-partisanship. Brief of CLUM at 21.

political candidates to whom they may be opposed. (Citations omitted.)

The Court emphasized that:

> the overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. Likewise, in *Buckley v. Valeo* [424 U.S.] at 26-27, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."

Id. at 208 (additional citations omitted).

In the instant case, we must observe that the foregoing government interests do not seem to be substantially implicated by MCFL's expenditures. Because MCFL did not contribute directly to a political campaign, MCFL's expenditures did not incur any political debts from legislators. Moreover, contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on

the abortion issue. That would appear to be the very purpose of the organization and the contributions to it.

The FEC contends that the instant case is controlled by *National Right to Work Committee*, 459 U.S. 197. In that case, the Supreme Court upheld the prohibition of the use of corporate funds to distribute a letter soliciting contributions for the corporation's political action fund which, in turn, contributed directly to candidates. However, the instant case, unlike *National Right to Work Committee*, involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates. *See Federal Election Commission v. National Conservative Political Action Committee*, 53 U.S.L.W. 4293, 4297 (U.S., March 18, 1985). ("NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.") The government has less interest in regulating independent expenditures than in regulating direct campaign contributions. As the Supreme Court stated in *Buckley*:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Buckley v. Valeo, 424 U.S. at 47.

We must conclude that the FEC has offered no substantial government interest in prohibiting MCFL's expenditures for publication of its Special Election Editions. We therefore hold that the application of section 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights. On that basis, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-609-G

FEDERAL EELCTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

OPINION

June 29, 1984

GARRITY, J.

This is an enforcement proceeding by the Federal Election Commission (FEC) seeking to invoke the provisions of § 441b of the Federal Election Campaign provisions of § 441b of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 441b, against the defendant Massachusetts Citizens for Life, Inc. (MCFL) for having made expenditures of corporate funds[1] in connection with the 1978 elec-

[1] After the FEC brought this suit, defendant MCFL established a separate, segregated fund to be utilized for political purposes (often called a political action committee or PAC) pursuant to 2 U.S.C. § 441b(b)(2)(C), and presumably the costs of any current MCFL newsletters are borne by this PAC. However, this action has not on that account become moot, since the complaint seeks payment to the United States Treasury of a $5,000 civil penalty.

tion of Massachusetts candidates for federal office. Jurisdiction rests upon 28 U.S.C. § 1345 and 2 U.S.C. § 437g(a)(6)(A).[2] Cross-motions for summary judgment were filed by the parties on a record consisting of affidavits, answers to interrogatories and a notice to admit facts and depositions. Exhaustive legal memoranda, which incidentally discussed many sub-issues and side issues and contingent issues and alternative grounds not reached in this opinion, were filed before and subsequent to oral argument.

I

The facts are essentially undisputed. The defendant is a Massachusetts corporation formed in January 1973 for the following purpose:

> To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized under Chapter 180 of the general Laws of the Commonwealth of Massachusetts.

In September 1978 MCFL published an eight-page "Special Election Edition" of the MCFL newsletter

[2] Section 437g jurisdiction may be contrasted with that under 2 U.S.C. § 437h providing for actions to construe the constitutionality of any provision of the Federal Election Campaign Act, in which the district court immediately certifies questions of constitutionality to the Court of Appeals, which sits en banc. See *Bread Political Action Com. v. FEC*, 7 Cir. 1979, 591 F.2d 29, *Athens Lumber Co., Inc. v. FEC*, 11 Cir. 1983, 689 F.2d 1006, 1009-1011, en banc 718 F.2d 363, cert. den. 52 L.W. 3686 (March 19, 1984), and *FEC v. TRIM*, *infra*, at 49-51.

and mailed it to 58,025 persons. The defendant expended from its general treasury funds $475 to prepare the edition, $2100 to print it and $6800 for mailing. Some minor errors in the voting records of three candidates were discovered and, later in the month, a revised partial edition was printed at a cost of $492 for 20,000 copies. MCFL's total expenditure for the two printings and distributions was $9812.

The first-page headline of the editions read, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE". The editions listed all candidates in an upcoming September 19, 1978 primary election for Congress, state Governor and state legislature and reported their positions on three pro-life issues: a "constitutional human life amendment", legislation to prohibit the use of tax funds for abortions, and legislation to provide positive alternatives to abortion. The positions of incumbents were derived from their voting records and of non-incumbents from their answers to questionnaires. The editions urged that recipients "vote pro-life" and carried photographs only of congressional and gubernatorial candidates whose records or promises met with MCFL approval. However, the text also stated, "This special election edition does not represent an endorsement of any particular candidates" and FEC has not contended that the publication constituted express advocacy for any of the candidates.

II

Before entering the thicket of statutes and regulations governing federal elections, some preliminary observations may be in order. First, this is probably a case of first impression. To the best of our knowledge plaintiff has not heretofore sought to invoke the

provisions of § 441b against a noncommercial corporation for making expenditures in connection with either a primary or final election to federal office. Judicial interpretations of § 441b or its predecessor are found in criminal cases, e.g., *United States v. Chestnut*, S.D. N.Y. 1975, 394 F.Supp. 581, civil actions for enforcement of administrative subpoenas, e.g., *FEC v. Long Island Tax Reform Immediately Committee (TRIM)*, 2 Cir. 1980, 616 F.2d 45, or pursuant to the disclosure and reporting provisions of other sections of the Federal Election Campaign Act, e.g., *FEC v. American Federation of State, County and Municipal Employees*, D.C. D.C. 1974, 471 F.Supp. 315, or in cases concerning campaign contributions, e.g., *FEC v. National Right to Work Committee (NRWC)*, 1982, 459 U.S. 197.[3] Civil penalties and contempt adjudications are among the sanctions now provided in § 437g for violations of § 441b. The complaint in the instant case seeks a civil penalty of $5,000.

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[3] After the Supreme Court decision in the *NRWC* case, the parties filed supplemental memoranda on the question whether it is controlling precedent in this case. In our opinion, it is not. Plaintiff argues that the Supreme Court treated NRWC's solicitation of campaign contributions from nonmembers as the making of prohibited expenditures. We believe, however, that a fair reading of its unanimous opinion leaves no doubt that the Court was addressing the legality of NRWC's fundraising, viz., solicitation of contributions to be donated to political candidates or campaign committees, not the legality of its expenditures. See *Democratic Party v. National Conservative P.A.C.*, E.D. Pa. 1983, 578 F.Supp. 797, 820. For one thing, the opinion did not quote or even cite the statutory definitions of "expenditure", § 441b(b)(2) and § 431(f) except, at 201, in passing reference to separate segregated funds. Also, *NRWC* discussed only freedom of association, not freedom of speech.

Secondly, the facial constitutionality of § 441b is not an open question. The compelling government interest in preserving the integrity and appearance of integrity of federal elections that underlies the regulation of campaign contributions and expenditures has been long established, at least since *United States v. Automobile Workers*, 1957, 352 U.S. 567. The constitutionality of the FECA was explored in depth in the "watershed case" of *Buckley v. Valeo*, 1976, 424 U.S. 1, in which the opinions *per curiam* and of the individual Justices exceeded 200 pages. Likewise, the precious First Amendment interests here involved need simply to be recognized, not explicated. We subscribe to Judge Sweet's statement in *FEC v. Weinsten*, S.D. N.Y. 1978, 462 F.Supp. 243, 249:

> For this court to elaborate on the nature of free speech would be presumptious in view of the exhaustive literature in this field and the opinions already referred to.

The derivation and relationship between First Amendment freedoms and democracy's dependence upon honest and apparently honest elections have been described in numerous scholarly articles, e.g., Corporate and Labor Union Activity in Federal Elections: "Active Electioneering" as a Constitutional Standard, 49 Geo. Wash. L. Rev. 761 (1981), and decisions, e.g., *United States v. Chestnut*, *supra* at 588-591, *Common Cause v. Schmitt*, D.C. D.C. 1980, 512 F.Supp. 489, 493-500.

Thirdly, in ruling upon the parties' cross-motions for summary judgment we are mindful of the "basic principle that . . . If a court can decide a case on non-constitutional grounds, it should not stray into the field on constitutional analysis." *FEC v. TRIM*, *supra*

at 51-52. See also the classic exposition of this principle in *United States v. Automobile Workers, supra* at 590-592. This does not mean, however, that the statute can be construed without awareness of the impact of plaintiff's interpretation of § 441b on the defendant's freedoms of speech and association. First Amendment interests permeate the issues of statutory construction here presented, and Congress will not be presumed to have been insensitive to them.

III

Section 441b(b)(2) provides the applicable definition [4] of "expenditure", as follows:

> For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election. . . .

Section 441b thus outlaws indirect payments or gifts of anything of value *to* any candidate, campaign committee or political party or organization. Was defendant's publication of the Special Election Editions intended by Congress to be such a payment or gift? We think not. The publication was uninvited by any candidate and uncoordinated with any campaign.[5] When competing candidates were on the same

[4] In our opinion, this definition is exclusive despite use of the verb "shall include" rather than "shall mean" because § 431(f)(4)(H), the definition section of FECA, in effect adopts the § 441b(b)(2) definition.

[5] "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and

side of the abortion issue, it did not suggest a preference. To the extent that it was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which, according to public opinion polls, is opposed by most citizens. It listed the positions of hundreds of candidates on a single political issue, without however expressly advocating the election or defeat of any particular candidate or belittling the importance of other election issues. The publication cost less than $10,000 and nearly 500 candidates were surveyed, an alleged "expenditure" of about $20 per candidate. If the space in the editions devoted to candidates for federal office be segregated from the rest, the cost of the papers was about $4,000 for 50 candidates, or $80 per—in either case, hardly the sort of "large" expenditures, repeatedly referred to in *Buckley v. Valeo, supra*, or "indirect contributions" which the 1947 amendment to the Federal Corrupt Practices Act was aimed at. *See United States v. CIO*, 1948, 335 U.S. 106, 115, 122.

IV

We also hold that the tabloids in question were not expenditures prohibited by § 441b because they were "news story, commentary, or editorial distributed through the facilities of any . . . periodical publication" and hence exempted from the definition of ex-

indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley v. Valeo, supra*, at 47.

penditure by the 1974 amendments to FECA, found now in 2 U.S.C. § 431(9)(B)(i) (before 1980 at § 431(f)(4)(A)).[6] They listed the voting records of incumbents on three legislative proposals pertaining to abortions and reported the responses to questionnaires regarding these proposals received from nonincumbent candidates; and urged readers to vote pro-life. In our opinion, the compilation of voting records and questionnaire responses was news, probably not available elsewhere; and the call to vote pro-life, in conjunction, incidentally, with a quotation from Thomas Jefferson, was editorial.

The closer question is whether the special election editions were "periodical publications"[7] within the meaning of the statutory exemption. We find that they were. First, they were similar in newsprint, sheet form, size and format to the "MCFL Newsletter" that the defendant published relatively regularly, subject only to the availability of sufficient funds, for five years before 1978. The newsletters

[6] The complete provision is: The term "expenditure" does not include—any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. There is no claim in this case that the defendant's facilities are owned or controlled by any political party, committee or candidate.

[7] The term is not defined elsewhere in the statute or regulations. The Commission has suggested, in accordance with FEC Advisory Opinion AO 1980-109, CCH Guide ¶ 5556, that we borrow and apply the definition of the term "bona fide newspaper" in regulations at 11 CFR § 110.13, as elaborated at 44 Fed. Reg. 76735 (12/27/79). But § 110.13 concerns the staging of political debates, which in our view presents quite different problems.

typically filled 6-10 pages of newsprint and included explanations and endorsements of its opposition to abortions, reports of political developments and judicial rulings on abortion-related issues, announcements of social activities for members and appeals for funds. Special election editions were published prior to all elections since 1974, thrice before 1978. Secondly, the legislative history of the newspaper exemption shows that Congress intended that it be a broad exemption, coextensive with the First Amendment. The relevant House of Representatives committee report, H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974), stated that

> it is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press or of association. (emphasis added)

The same report indicates that the amendment would conform the statute to preexisting law, which would presumably include the *caveat* expressed in *United States v. CIO*, *supra*, at 123, as follows:

> It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. It is unduly stretching language to say that members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests.

Another indication of the breadth of the news exemption from FECA's definition of "expenditure"

was Congress' simultaneous enactment of a narrower provision exempting newspapers from the reporting and disclosure provisions of FECA, § 437(a).[8]

V

If § 441b were intended by Congress to prohibit MCFL's expenditures of printing and distributing the newsletters in question, it would be unconstitutional under the First Amendment as applied to MCFL because violative of MCFL's freedoms of speech, press and association. Our opinion on this point is based upon the junction in this case of three distinctive features of the expenditures at issue. They were (a) independent of any candidate or party, (b) by a nonprofitmaking corporation formed to advance an ideological cause and (c) for the purpose of publishing direct political speech. We discuss each in turn.

The only compelling governmental interest[9] that would justify the application of § 441b to the defendant's Special Election Editions, to wit, the prevention of real or apparent corruption, has not been shown by plaintiff to be implicated here. The danger that the newsletters might, like large campaign contributions, "secure a political *quid pro quo* from current and potential office holders", *Buckley v. Valeo, supra* at 26, or create political debts, *First National Bank of Boston v. Bellotti, supra* at 788, fn. 26, or "pose a perceived threat of actual or potential corruption,"

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[8] This provision was invalidated as unconstitutional by the Court of Appeals decision in *Buckley v. Valeo*, D.C. Cir. 1975, 519 F.2d 821, 869-78, an aspect of the case not reviewed by the Supreme Court in its landmark decision.

[9] "*Buckley* identified *a single narrow exception* to the rule that limits on political activity were contrary to the First Amendment." *Citizens Against Rent Control v. Berkeley*, 1981, 454 U.S. 290, 296-297 (emphasis added).

California Medical Assn. v. FEC, 1981, 453 U.S. 182, concurring opinion of Blackmun, J. at 203, has not been shown. The election editions were accurate tabulations of all candidates' positions on three public issues espoused by MCFL, without express advocacy of the election of a particular candidate. The costs of their composition and distribution were made without the cooperation, consultation, request or suggestion of any candidate, see § 431(17) of the Act, and hence independent expenditures, a fact which *Buckley v. Valeo, supra* at 47, quoted *ante* at fn. 5, says "alleviates *the danger* that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (emphasis added). In our opinion, this independence under the circumstances of the instant case not merely alleviates "the danger" which is an essential predicate to curtailment of MCFL's First Amendment freedoms—it eliminates it.

Other governmental interests have sometimes been advanced in support of § 441b: to protect shareholders from having corporate funds used to support political candidates to whom they may be opposed, *FEC v. NRWC, supra* at 207-208, and "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Auto Workers, supra* at 575. It is self-evident that the expenditures at issue in this case are not contrary to these two interests. The expenditures in question clearly carry out the widely publicized purpose of MCFL's existence, viz., opposition to abortion, of which all members must be aware before sending in donations. As for promoting citizen responsibility, publication of tabloids urging readers to go to the polls and vote for candidates sharing their views on an important public issue is scarcely inconsistent with that governmental interest.

Buckley v. Valeo, supra at 44-48, ruled that independent expenditures are constitutionally protected if made by an individual or group "in order to engage directly in political speech." *California Medical Assn. v. FEC*, 1981, 453 U.S. 182, 195. The single differentiating factor in the instant case from *Buckley* is the defendant's corporate form. But that difference cannot be dispositive. The corporate identity of the speaker does not deprive speech of what otherwise would be its clear entitlement to protection. *First National Bank of Boston v. Bellottoi, supra* at 778-786. The dissenting justices in that case emphasized the nature of commercial corporations. Probably they would not have dissented had the holding been limited to nonprofitmaking corporations like MCFL. This is indicated in Mr. Justice White's dissenting opinion, at 805, as follows:

> It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see *NAACP v. Button*, 371 U.S. 415 (1963), there are *some corporations formed for the express purpose of advancing certain ideological causes shared by all their members*, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as *merely a means of achieving effective self-expression.* But this is hardly the case generally with corporations operated for the purpose of making profits. (emphasis added).

Thus the second critical element of MCFL's constitutional claims is the nature of the defendant corporation.

The third is the purpose of the expenditures the FEC seeks to forbid: the publication of direct political speech, not the solicitation of contributions from 267,000 individuals as in *FEC v. NRWC, supra*, nor "speech by proxy" [10] by means of contributions to a political action committee as in *California Medical Assn. v. FEC*, supra, (such "speech by proxy" . . . is not *the sort of* political advocacy . . . entitled to full First Amendment protection." *Id.*, at 196. Emphasis added.) *Brown v. Hartlage*, 1982, 456 U.S. 45, held the Kentucky Corrupt Practices Act unconstitutional as applied to a candidate for public office who made a campaign promise to serve if elected at a salary less than that fixed by law, finding, at 56-57, "that the statements of petitioner Brown . . . were *very different in character* from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment." (emphasis added). Similarly here, the defendant's special election editions were the very antithesis of a corrupting agreement or contribution. They were open, strived for accuracy, reported on every candidate regardless of prospects of election and urged readers to vote on election day. They sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue. Far from being an improper influence, or eroding public confidence in the electoral process,

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[10] "[T]his attenuated form of speech does not resemble the direct political advocacy to which this Court in *Buckley* accorded substantial constitutional protection." *California Medical Assn. v. FEC, supra*, fn. 16 at 196.

or threatening its integrity, *FEC v. NRWC, supra* at 207-208, they would seem to promote rather than undermine the honest functioning of representative government.

Conclusion

In their briefs and oral arguments the parties have addressed in many ways but always indirectly an issue of characterization that we feel is best stated explicitly: in publishing its Special Election Editions in 1978, was the defendant spending or speaking? Plaintiff would answer the former and defendant would answer the latter. Both would, of course, be correct, but only partially so. Essentially, however, we agree with the defendant that the costs of the publications in question are more accurately characterized as speaking than spending and that in placing the FCPA in the FECA as new § 441b Congress did not intend to proscribe the type of expenditure made by the defendant in 1978.

Alternatively, and conditionally upon our having misinterpreted § 441b and § 431(9)(B)(i), we have observed the precept, "regulation of First Amendment rights is always subject to exacting judicial scrutiny", *Citizens Against Rent Control v. Berkeley, supra* at 298, and found that to apply the Federal Corrupt Practices Act, 2 U.S.C. § 441b, to defendant MCFL's 1978 Special Election Editions would violate its rights to freedom of speech, press and association under the First Amendment of the United States Constitution. Accordingly it is ordered that plaintiff's motion for summary judgment be denied and that defendant's motion be granted and that judgment be entered for the defendant dismissing the complaint.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: July 31, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

By Richard W. Gordon
Chief Deputy Clerk.

[cc: Messrs. Bader, Fox, O'Connell, Heins, Featherstone and Alviani]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

NOTICE OF APPEAL

[Filed Aug. 28, 1985]

The appellant Federal Election Commission hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the First Circuit, entered on July 31, 1985, finding 2 U.S.C. § 441b to be unconstitutional as applied to appellees.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Assistant General Counsel

/s/ Carol A. Laham
CAROL A. LAHAM
Attorney

FOR THE APPELLANT
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

August 22, 1985

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Docket No. 84-1719

Certificate of Service

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

CERTIFICATE OF SERVICE

I certify that I have caused to be served, by first-class mail postage prepaid, a copy of the Federal Election Commission's Notice of Appeal in the above-captioned case on this 22nd day of August, 1985, on the following counsel at the addresses set forth below:

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/s/ Carol A. Laham
CAROL A. LAHAM

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

GARRITY, D. J.

FEDERAL ELECTION COMMISSION,
1325 K Street, N.W.,
Washington, D.C. 20463, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
313 Washington Street,
Newton, Massachusetts, DEFENDANT.

COMPLAINT

JURISDICTION

1. Jurisdiction of this court is invoked under 28 U.S.C. § 1345 as an action commenced by an agency of the United States expressly authorized to sue by an act of Congress. This action is instituted pursuant to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.*, (hereinafter the "Act" or "FECA") which provides that the Federal Election Commission may institute a civil action for relief (including an order for a civil penalty) in the district Court of the United States in which the person against whom such action is brought resides or transacts business. 2 U.S.C. § 437g(a)(6). The Act also provides that any such action brought before the district court shall be advanced on the docket of the

court and put ahead of other actions. 2 U.S.C. § 437g(a)(10).

PARTIES

2. Plaintiff, Federal Election Commission (hereinafter the "Commission") is the independent agency of the United States vested with exclusive jurisdiction for civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(a)(6) and 437d(e).

3. Defendant Massachusetts Citizens for Life, Inc., (hereinafter "MCFL") is a non-profit corporation registered under the laws of the state of Massachusetts and lists its address as 313 Washington Street, Newton, Massachusetts.

FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED

4. 2 U.S.C. § 441b(a) prohibits any corporation whatever from making contributions or expenditures in connection with any federal election.

5. 2 U.S.C. § 441b(b)(2) defines expenditure as "any direct or indirect payment, distribution, loan, advance, deposit or gift or money, or any services, or anything of value. . . to any candidate, campaign committee or political organization, in connection with any [federal] election. . ."

6. 2 U.S.C. § 441b(b)(2)(C) excludes from the definition of expenditure "the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative or corporation without corporate stock."

7. 2 U.S.C. § 431(9)(B)(iii) excludes from the definition of expenditure "any communication by any

membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office. . ."

STATEMENT OF CLAIM

8. In September 1978, MCFL prepared, printed and distributed to the general public copies of a flyer entitled "Special Election Edition" (see Exhibit 1 attached.)

9. The "Special Election Edition" identified candidates for the 1978 federal elections, stated their positions on abortion issues and exhorted the reader to vote for those candidates who were opposed to abortion.

10. The "Special Election Edition" was mailed to 58,025 persons, at least 50,000 of whom were not members of MCFL.

11. MCFL expended $475.00 to prepare, $2,113.75 to print and $6,842.01 to mail the "Special Election Edition" to recipients.

12. In September 1978, 20,000 copies of four pages of the "Special Election Edition" were prepared, printed and distributed to the general public under the title, "Special Election Edition—Complimentary Partial Copy" (see Exhibit 2 attached).

13. The "Special Election Edition—Complimentary Partial copy" identified candidates for the 1978 federal elections, stated their positions on abortion issues and exhorted the reader to vote for those candidates who were opposed to abortion.

14. MCFL expended $492.00 to print the "Special Election Edition Partial Complimentary Copy."

15. MCFL expended a total of $9,812.76 to prepare, print and distribute the "Special Election Edition" and the "Special Election Edition—Complimentary Partial Copy." Approximately one-half of the expenditures for the "Special Election Edition" and all of the expenditures for the "Special Election Edition Complimentary Partial Copy," a total of over $4,000, were made in connection with a federal election and violated 2 U.S.C. § 441b(a).

16. On the basis of a complaint filed with the Commission on May 1, 1979, the Commission determined on June 27, 1979, that there was reason to believe that MCFL violated 2 U.S.C. § 441b(a) by the expenditures made in connection with a federal election described in paragraph 15. Also on June 27, 1979, the Commission initiated an investigation into this matter. 2 U.S.C. § 437g(a)(2).

17. Pursuant to 2 U.S.C. § 437g(a)(5)(A), (amended in 1979 by Pub. L. No. 96-187, 93 Stat. 1339), the Commission, on December 20, 1979, found reasonable cause to believe that MCFL violated 2 U.S.C. § 441b(a) and notified MCFL of this finding.

18. After the failure of repeated efforts at conference, conciliation and persuasion, the Commission on October 21, 1980, found probable cause to believe that MCFL violated 2 U.S.C. § 441b(a). Accordingly, MCFL was sent notification of this finding. 2 U.S.C. § 437g(a)(4)(A).

19. After finding probable cause to believe that MCFL committed a violation of 2 U.S.C. § 441b by the expenditures made in connection with the 1978 federal elections described in paragraph 14, the Commission again attempted to conciliate this matter with MCFL. 2 U.S.C. § 437g(a)(4)(A).

20. The Commission, being unable to agree with MCFL upon terms for a mutually acceptable conciliation within the statutorily prescribed time limit, authorized the Office of General Counsel to file a civil suit in the United States District Court for relief in this matter. 2 U.S.C. § 437g(a)(6).

WHEREFORE, plaintiff, Federal Election Commission prays that this court:

(1) find the Massachusetts Citizens for Life, Inc. violated 2 U.S.C. § 441b(a) by making expenditures in connection with a federal election to prepare, print and distribute the "Special Election Edition" and the "Special Election Edition—Complimentary Partial Copy";

(2) order Massachusetts Citizens for Life, Inc., to pay a civil penalty of $5,000 to the United States Treasury.

(3) order such other and further relief as the court deems appropriate.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

/s/ R. Lee Andersen
R. LEE ANDERSEN
Attorney

FEDERAL ELECTION COMMISSION
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[Exhibits 1 and 2 have been lodged with the Court]

APPENDIX F

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b (b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year.

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advo-

cacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply

with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the

costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of genera! public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with

any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

§ 432. Organization of political committees

(a) *Treasurer; vacancy; official authorizations.* Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) *Account of contributions; segregated funds.*

(1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess

of $50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall—

(A) if the amount of the contribution is $50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess of $50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) all funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) *Recordkeeping.* The treasurer of a political committee shall keep an account of—

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with

the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or cancelled check for each disbursement in excess of $200.

(d) *Preservation of records and copies of reports.* The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for 3 years after the report is filed.

(e) *Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.*

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1) of this section.

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for

use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3) (A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that—

(i) the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of account with respect to its function as a principal campaign committee; and

(ii) candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of $1,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is

not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 441b(b) shall include the name of its connected organization.

(f) *Filing with and receipt of designations, statements, and reports by principal campaign committees.*

(1) Notwithstanding any other provision of this Act, each designation, statement, or report of receipts or disbursements made by an authorized committee of a candidate shall be filed with the candidate's principal campaign committee.

(2) Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act.

(g) *Filing with and receipt of designations, statements, and reports by Clerk of House of Representatives or Secretary of Senate; forwarding to Commission; filing requirements with Commission; public inspection and preservation of designations, etc.*

(1) Designations, statements, and reports required to be filed under this Act by a candidate or by an authorized committee of a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, and by the principal campaign committee of such a candidate, shall be filed with the Clerk of the House of Representatves, who shall receive such desig-

nations, statements, and reports as custodian for the Commission.

(2) Designations, statements, and reports required to be filed under this Act by a candidate for the office of Senator, and by the principal campaign committee of such candidate, shall be filed with the Secretary of the Senate, who shall receive such designations, statements, and reports, as custodian for the Commission.

(3) The Clerk of the House of Representatives and the Secretary of the Senate shall forward a copy of any designation, statement, or report filed with them under this subsection to the Commission as soon as possible (but no later than 2 working days) after receiving such designation, statement, or report.

(4) All designations, statements, and reports required to be filed under this Act, except designations, statements, and reports filed in accordance with paragraphs (1) and (2), shall be filed with the Commission.

(5) The Clerk of the House of Representatives and the Secretary of the Senate shall make the designations, statements, and reports received under this subsection available for public inspection and copying in the same manner as the Commission under section 438(a)(4), and shall preserve such designations, statements, and reports in the same manner as the Commission under section 438(a)(5).

(h) *Campaign depositories; designations, maintenance of accounts, etc.; petty cash fund for disbursements; record of disbursements.*

(1) Each political committee shall designate one or more State banks, federally chartered de-

pository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account and such other accounts as the committee determines at a depository designated by such committee. All receipts received by such committee shall be deposited in such accounts. No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except by check drawn on such accounts in accordance with this section.

(2) A political committee may maintain a petty cash fund for disbursements not in excess of $100 to any person in connection with a single purchase or transaction. A record of all petty cash disbursements shall be maintained in accordance with subsection (c)(5) of this section.

(i) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

§ 433. Registration of political committees

(a) *Statements of organization.* Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1). Each separate segre-

gated fund established under the provisions of section 441b(b) shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4).

(b) *Contents of statements.* The statement of organization of a political committee shall include—

(1) the name, address, and type of committee;

(2) the name, address, relationship, and type of any connected organization or affiliated committee;

(3) the name, address, and position of the custodian of books and accounts of the committee;

(4) the name and address of the treasurer of the committee;

(5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and

(6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) *Change of information in statements.* Any change in information previously submitted in a statement of organization shall be reported in accordance with section 432(g) no later than 10 days after the date of the change.

(d) *Termination, etc., requirements and authorities.*

(1) A political committee may terminate only when such a committee files a written statement, in accordance with section 432(g), that it will no longer receive any contributions or make any disbursement and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for—

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

§ 434. Reporting requirements

(a) *Receipts and disbursements by treasurers of political committees; filing requirements.*

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candi-

date is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the following reports shall be filed:

(i) a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31; and

(ii) a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under

paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A)(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before

(or posted by registered or certified mail no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) is sent by registered or certified mail, the United States postmark shall be considered the date of filing of the designation, report, or statement.

(6)(A) The principal campaign committee of a candidate shall notify the Clerk, the Secretary, or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i),

or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(b) *Contents of reports.* Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in

any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b);

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6)(A) for an authorized committee, the name and address of each person who has

received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of an such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount or any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty or perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calandar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of this section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after

such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political

committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing monev or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

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